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AVIATION: A RISKY BUSINESS*
Green and level playing fields?
A paradox of virtues†
‘DUMPING’ – Anti-competitiveness!

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Abstract:

The paper considers the ICAO vision statement (as cited in the lead-in) and investigates the paradoxes found within aviation and the specific intentions of the contracting States. The research investigates the liberalization of the industry and governments' reluctance to open up the skies. The research also includes a review of the progress made by the EU in terms of liberalization - internally and externally; and, the research identifies some of the challenges and actions – specifically, in relation to conflicting policies. This includes trying to level up the ‘playing-field,’ particularly in respect to the practice of ‘dumping’ by the airlines. The paper concludes by returning to the ICAO vision, and finds that, despite an honourable intention of the Contracting States, progression will remain impeded – with the paradox remaining in respect to the statement made and the intention to actually undertake this.

Keywords: Liberalization; protectionism; competition; EU and International Law; Paradoxes of policies and practice.

Reference to this paper should be made as follows: XXXX

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* *The Risky Business* phrasing, relates to research undertaken as part of Sarah's Fulbright-Lloyd's of London Scholarship funding, in the US, at De Paul University (International Aviation Law Institute) Chicago (2015-2016).

† Based on the *Daodejing*, this relates to the relationship between the virtues and moral motivation. The writer, Laozi puts forward a view which might be termed a "paradox of virtue"—the phenomenon that a conscious pursuit of virtue can actually lead to a diminishing of virtue.

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The collective vision of ICAO's Members is that:

'the Member States of the International Civil Aviation Organization, resolve to actively pursue the continuous liberalization of international air transport to the benefit of all stakeholders and the economy at large.'

And that this,

*'will be guided by the need to ensure respect for the highest levels of safety and security and the principle of fair and equal opportunity for all States and their stakeholders.'*¹

1. INTRODUCTION

The above 'noble' declaration made by the International Civil Aviation Organisation (ICAO) members is a long-term vision for international air transport, and, in particular, the aim and drive to seek more liberalization, or even full liberalization across the globe, which ensures fairness and equality.

However, aviation is full of paradoxes, as indeed the above statement arguably is. And whilst aviation remains a risky business in terms of monetary returns, namely realising a profit, and, the degree of liberalization that the industry and indeed, respective governments, are willing to tolerate and concede, there remains a fine line between anti-competitive practices, which seek to protect and those that maintain a fair balance in trade and services.

Whilst it is readily recognized that liberalization is occurring in the airline industry, it can hardly be stated, to date, to have reached the same level as other industries, or to have been implemented in the same terms around the world. There is far from a 'level playing field'² – a setting, which allows for symmetrical rules being applied to all competing parties in an international setting.³

This paper analyses certain paradoxes and contradictions found in aviation particularly within 'competition' and 'anti-competitive' practices and the concept of 'regulation,' 'liberalization' and 'free trade' in respect to air transport.

The research includes a review of the progress made by the EU in terms of liberalization internally and externally.⁴ And, the research identifies some of the challenges and actions – specifically, in relation to conflicting policies. This includes trying to level up the 'playing-field,' particularly in respect to the practice of 'dumping' by the airlines. The analysis considers whether this practice should in fact be construed as anti-competitive, or whether the actual treatment and response to dumping is itself anti-competitive, and even unfair in view of the ICAO vision.

Contextualisation is firstly given in terms of providing an overview and setting the scene from a more holistic sense, which includes, introducing the concept of free trade, considering paradoxes, and a historical review.

The paper concludes by returning to the ICAO statement.

2. The free trade argument: *fair and equal opportunities*

Long before commercial air flights, the economist Adam Smith, writing in 1776, discussed ‘*The Wealth of Nations*’ and advocated a change to the then trading and economic practices.⁵ However, even before Smith, the 16th Century Spanish theologian, Francisco de Vitoria had advocated the theory of free trade, and particularly the idea of world bodies, or the principles of ‘*jus gentium*’ – the laws of nations, or international law concept as a ‘charter-based regulator’ for equal standing of all nations.⁶ Grotius later developed this basis including the significance of the sea to trading, in his *Mare Liberum*⁷ theory, which was instrumental in the development of Laws of the Sea on which Air Law were subsequently based. The right to travel and the significance of transport was clearly recognised as a significant part of the ability to trade freely, an ‘*jus sanctissimum*’ a ‘sacro-sanct law.’⁸

Although, various different trade models remain, the earliest suggestions related to the simple exchange or the production model; however, opponents of free trade have been prevalent for many years, and even the simplest idea generated protectionist opposition. Many early adversaries identified, in respect to goods and services, that emerging economies have lower wages or cheap labour, which would overwhelm the richer nations, with lower production costs and final unit pricing. The fear lies in the fact that this would eventually lead to the wealthier nations not being able to compete, suffering high unemployment and production loss, which would ultimately affect the nations economy and financial standing.

This ultimately was to be the basis of international civil aviation, conflicting viewpoints and an underlying culture of protectionism. Inevitably this was not the most conducive foundation for the liberalization of air services and for *the economy at large*. And therein lies the primary paradox; when the current international world body - the International Civil Aviation Organization (ICAO) was formed, amongst the objectives set was the requirement to ‘*meet the needs of the peoples of the world [with regards to] efficient and economical air transport;*’ but also to ‘*insure that the rights of contracting States [were] fully respected*’ – from this sense this is to be construed as the governments of the States.⁹ However, governments do not always act in a way that necessarily provides end users with the most economical air service; for whilst it was also said ‘*that every State*’ needed to have ‘*a fair opportunity to operate international airlines*’ and ‘*[a]void discrimination between contracting states,*’ there have been many instances of national protectionist methods being applied which arguably distort opportunities and prevent equal competition (Article 44 – Chicago Convention).

3. Paradoxes

‘*Paradoxes are nothing but trouble. They violate the most elementary principle of logic: Something cannot be two different things at once.*’¹⁰ Or, can it be? Doganis¹¹ states in relation to the aviation industry that it is an ‘enigma;’ on the one hand, still a highly regulated and controlled industry, on the other, subject to new technology and rapid change. Whilst Bartsch¹² presents the thought that ‘*[t]he aviation industry is what is its today not in spite of, but rather because of, the law that regulates it.*’ So is air transport over regulated? Or, is there necessary regulation in place to serve a purpose? And is that purpose to aid free trade and competitiveness, or

to protect a fledgling and vulnerable industry, or to allow governments to retain control?

3.1. Risk: liberalization and de-regulation vs. regulation

Risk exists in many shapes and forms, and whilst aviation is recognised as a dynamic growth industry, it is arguably also a risky business; for, whilst predictions of growth estimate that passenger numbers are expected to reach 7.3 billion by 2034, which represents a 4.1% average annual growth in demand for air connectivity,¹³ the industry battles to achieve a profit. The early forecast for 2015 anticipated a \$29.3 billion net profit;¹⁴ which predicted the strongest profit margin since the 1960's;¹⁵ and importantly, meant, that for the first time since the International Air Transport Association (IATA) started studying the metric, in the early 1990s, the industry's returns on capital were expected to exceed its cost of capital.¹⁶ However, aviation is highly subject to aero-politics and extrinsic influences, which causes constant revision of forecasts. In early June 2016, IATA revised its financial outlook for global air transport industry profits upwards to \$39.4 billion (from \$36.3 billion forecast in December 2015). And, IATA expected this to be 'generated on revenues of \$709 billion for an aggregate net profit margin of 5.6%' - meaning that 2016 was forecasted to be the 'fifth consecutive year of improving aggregate industry profits.'¹⁷

That said, there were two later significant events in 2016, which will no doubt significantly influence the development of air services (and therefore profit) – the UK's - Brexit¹⁸ and the US – Presidential elections,¹⁹ which saw Donald Trump securing the position of the most powerful leader in the world. The implication of both of these incidents has yet to be fully gauged (particularly collectively) but there is no doubt that both events will be significant to aviation going forward and inevitably world unity – which aviation so typically represents. Perhaps, more ironically and paradoxically, both these, arguably, '*surprise*' results, point to the fact that both nations' people are staking their claim to sovereign protectionism – which points to less willingness to engage in free trade and the opening of their market. Therefore, political stability of nationals and the political leaning and direction of nations debatably remains one of the riskiest elements of all to aviation.

But, risk also exists in terms of aviation safety – however, paradoxically, in contrast to the political uncertainty the world contestably finds itself in, there has been a growing trend of safety improvements due to a concerted effort by ICAO to '*promote safety of flight in international air navigation*.'²⁰ This has resulted in more monitoring and oversight, and conversely, arguably, also more regulation and tighter enforcement.²¹ 2012 and 2013 resulted in the lowest premiums for aviation insurance for many years,²² whilst 2014 may have 'technically' been recorded as one of the safer years in terms of the number of fatal accidents; it was, however paradoxically, only the 24th safest in terms of fatalities.²³ Of course, technical standards and particularly safety have been subjects where internationally there has been a high degree of agreement, which equates to hence a high level of success.²⁴

In contrast to a more united approach to achieving safety advancements, liberalization of the air industry, particularly air-services, has however always been a contentious topic, particularly historically for the governments of the respective countries.

The current Convention remains the 1944 Convention on International Civil Aviation (the Chicago Convention²⁵); and, the discussion of that year only to clearly show the controversy and the disparity of opinions amongst the attendees. Two contrasting

viewpoints then existed, the call for more open competition and ‘freedom of the air’ by the US government, and the more controlled approach of coordinating air transport in regards to access, frequency and tariffs, as voiced by Britain and its former colonies in particular.

However, what should importantly be recalled at this juncture is that, in 1944, the EU did not exist,²⁶ and as the Second World War (WWII – 1939-1945) had yet to finish, Europe was still very much fragmented and torn. At that time, Britain’s strength related to its influence over former nations of the British Empire, many of which formed part of the developing strategic air networks, whilst, Britain’s internal industry lay largely in ruins. Hence, prior to the talks in Chicago the playing field was far from level with, as Havel and Sanchez explain, the ‘European Allied Powers being in ruins’ and, in contrast, the US industrial base remaining largely unscathed by the war.²⁷ In order to compete long-term this meant that the European airlines would need government intervention and hence substantial subsidization; whereas, the US virtually had a complete monopoly of the production of four-engine aircraft alongside well established route structures, which it was obviously keen to exploit.

In terms of the 1944 discussions, Bartsch²⁸ reinforces that there were two main threads of the Conference in terms of promoting international air transport, namely of a (i) technical, and (ii) economic nature. However, due to the divide of opinion, only consensus could be reached in respect to the first objective, the less controversial strand. In respect of the economic objectives, the Chicago Convention arguably achieved very little, except perhaps the ability to compromise. As a consequence, two annexes were attached to the main Convention, one containing the two less contentious freedoms and the other annex detailing the other three freedoms (five in total).²⁹ It was therefore left to individual States to mutually exchange reciprocal commercial rights through air service agreements (ASA).

Bartsch argues that ‘the overarching concern of the majority of the conference delegates was maintaining state sovereignty.’³⁰ And, some 70 years later, sovereign protectionism still remains a barrier to air transport development with aviation, debatably, still battling excessive control, which has often stifled competition.³¹ That said, since Chicago, there has been an active advancement towards, so-called liberalization. This commenced in the US, through the Airline Deregulation Act, 1978³² before spreading to Europe, whereby a fortified EU extended the principle - most noticeably internally. This was accomplished through a series of successive legislative packages of measures and reforms, starting with the first package in 1987.³³

The assumption by many however, is that liberalization equates to less regulation.³⁴ Moreover, the phrasing of term ‘de-regulation’ is perhaps synonymously used when liberalization is more accurate to use. That said, regulation is often a needed means and mechanism to apply, with Haines arguing that regulation exists as a modernist approach, wherein it is used to ensure a greater level of compliance to ‘minimise risk, or avoid a specified harm.’³⁵ Therefore the interpretation of risk remains key. The paradoxical argument is that air transport remains a valuable asset to a country and relinquishing control is perceived as a risk by and to governments. From this perspective it is arguably the means applied to determine the risk, which is questionable.³⁶ The risk diversity in air transport is expansive and far exceeds just

operational risk. As Rod Eddington the former chief executive officer (CEO) of British Airways remarked, it is about the '*broader perspective of risk..... across the full spectrum.*'³⁷

It is not the actuarial concept that is therefore problematic but the failure to liberalize further due to political risk, and to a lesser degree this includes the socio-cultural perception of liberalization. Both remain debateable concepts as to the actual risk and consequences of doing nothing and undertaking further, or full liberalization. For governments this means having a clear strategic direction as to what drives and destroys industries and makes them more competitive and less competitive. Peter Drucker,³⁸ in the 1970's, commented that to take risks is the essence of economic activity. Bearing in mind these comments were made before the period of liberalization of the aviation industry began in earnest, it remains questionable as to the degree of liberalization that has occurred in air transport. Particularly problematic is the converse consideration - the unnecessary amount of control that still remains and the consequences of this economically. From this stance, regulation could be viewed to be both the problem and also a solution. However, in many instances the failure to fully open the market up has accurately been levied against nations 'unwillingness' to let go of the 'reins,' in terms of opening up the skies and welcoming (controlling) foreign investment and ownership in airlines.³⁹ Dominance and control is arguably a form of, or closely aligned to, protectionism; and in this case, of States' (and regional) governance over air transport.

3.2. *The paradox of protectionism – 'supporting trade!'*

Protectionism is not as easy as first imagined to define, and arguably, perhaps is dependant upon the views of an individual. Protectionism can also come in, and take, many forms. In some situations, protecting is not necessarily wrong; debatably, there is a fine line between protective mechanisms and procedures, which aim to protect; and those that, when applied, distort. Protection is largely accepted when it is applied equally or without favour. However, when there is favouritism or disfavour, which impedes a party, then this is generally termed 'protectionism.' However defining true equilibrium, in this sense, remains equally highly problematic.

From an economic perspective, protectionism is far from a new practice; market distortion through protectionist practices were frequently referred to all through history and 'mercantilism' in the seventeenth and eighteenth century is particularly well cited by economists.⁴⁰ However commercialism also stems from merchants, who had the clear intention to acquire both wealth and power. Arguably, that said, the majority of people are in commerce, business and services, to make a profit and not necessarily as ICAO would wish, for the benefit of the economy at large.

The 21st century witnessed a more progressive trading system beginning to develop, which saw a more multilateral approach to trade subsequently developing from its bilateral roots.

Today, protectionism within trade is normally viewed as the imposition of a trade-barrier, which impedes equality. And, regardless of mutual adoption to more open trading, trade protection measures and other competitive 'advantage' mechanisms are frequently encountered, both in goods and services.⁴¹ The application of barriers, which impede international trade (including services) are largely applied through

government entities (national and regional) and at their instigation (sometimes as the result of industry lobbying and for *the benefit of stakeholders*). Countries compete to achieve a positive balance of trade and in so doing, policies are often derived to favour exports and hamper imports. From a countries perspective this is viewed as national favouritism and certainly tariffs are a means to generate government revenue.

These methods are controversial both in respect to evoking both negative and positive support. When imposed at a government level, these may include tariffs and nontariff barriers, such as taxes on imports, which also serve controversially as a domestic subsidy; quotas, voluntary export restraints (VER's) and export subsidies. That said, it is often argued, that such measures whilst are 'protectionist' measures, should be viewed from a positive stance as they are applied as necessary measures, which actually serve to assist by ensuring fairness. Further justification is offered that measures are often applied to allow market entry and improve competition by assisting infant industries, reducing unemployment, income redistribution (redistribution of wealth), correcting market failure and promoting/protecting national security, etc.⁴² However, the converse argument, frequently advocated in response is that any protectionism measures, applied whatever the justification, runs the risk of retaliation and counter justifications, thus having the potential of ensuing a trade war.

4. GATT Rules and the WTO: *Fair trade!*

The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. The mission of the WTO is to open up markets, whilst making further advances in equitable trade.⁴³ Unlike ICAO, the WTO is not a UN specialized agency, but it maintains strong relations with the UN and its agencies since its establishment in 1995. The WTO-UN relations are governed by the "Arrangements for Effective Cooperation with other Intergovernmental Organizations-Relations Between the WTO and the United Nations."⁴⁴

The Articles of the General Agreement on Tariffs & Trade (GATT) were originally agreed in 1947 (referred to as GATT 1947). Subsidies, countervailing duties and anti-dumping action are all subject to GATT. The GATT agreements set the rules for unfair trading and were carried over to the WTO in 1995.⁴⁵ Both subsidization and arguably also dumping are seen as mechanisms which can be unfair to domestic traders, and subsequently, the overarching aim therefore of liberalizing international trade.

4.1. Subsidies

Under GATT, Article XVI specifically related to subsidies. Subsidies are concerned with the trade-distorting effects of a financial contribution that is made by a national or subnational government. It was a requirement that each government inform GATT of all subsidies where there is a risk that this 'contribution' will lead to an increase in exports or the reduction of imports. Through the Uruguay Round a more detailed Agreement on Subsidies and Countervailing Measures was adopted. The Agreement on Subsidies and Countervailing Measures is intended to build on the Agreement on Interpretation and Application of Articles VI and XVI as well as XXIII, which was negotiated in the Tokyo Round. However, subsidies can be very subtle and are not always in the form of money. When subsidies originating from governments are paid

to specific industries they may cause the subsidised goods to maintain a lower cost or price, inevitably this may cause market distortion in terms of both the price and the associated demand. Unlike tariffs, which raise consumer prices, subsidies lower them. Subsidies can be categorised in various divisions and the more common ones include production subsidies and export subsidies, however subsidies can also be issued directly to the consumer. Subsidies can therefore be hard to detect and can include a low interest rate, or disguised loan.

4.2. *Dumping*

Jacob Viner wrote on dumping as early as 1926 and offered that the practice of dumping was a form of price discrimination.⁴⁶

Dumping is a situation whereby the export price of a product is lower than its selling price in the exporting country. Article VI of GATT relates to dumping and anti-dumping measures.

Article 2 details that, ‘if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.’⁴⁷

The differentiation between the ‘normal’ value and ‘export price’ is called the ‘margin of dumping.’⁴⁸ The essence is about *determining* – determining that dumping has occurred is the first factor; and, the basis for this relates to a ‘fair comparison’ being made between the export price and the normal value and involves a ‘like’ product.

Article 3 – relates to determining the consequences (or ‘injury’) – which involves demonstrating the ‘causal relationship between the dumped imports and the injury to the domestic industry.’

However, price undertaking is permitted, whereby this is defined as ‘satisfactory voluntary undertakings from any exporter to revise its price or to cease exports to the area at dumped prices so that authorities are satisfied that the injurious effect of the dumping is eliminated.’⁴⁹

The WTO explains that, the agreement does not regulate the actions of companies engaged in ‘dumping.’ The focus is on how governments can or cannot react to dumping, therefore it considers restraints of anti-dumping actions, and it is often called the “Anti-dumping Agreement.” In other words, the WTO agreement allows governments to act against dumping where there is “material” (genuine) injury to the competing domestic industry. This requires government’s evidencing the circumstances based on the components as stated above, namely; (i) that dumping is taking place, (ii) calculating the extent of dumping (how much lower the export price is compared to the exporter’s home market price), and (iii) demonstrating that the dumping is causing actual injury or has the potential to do so.

It should be emphasised that under GATT/WTO rules, anti-dumping is only applicable to the trade in goods, specifically the 1993 Uruguay Round⁵⁰ of talks made no detailed provision in respect to services.⁵¹ Vaidya⁵² argues that this is because a service is delivered in the country where the consumer buys it, however, this would

have to be disputed with regards to cross border trade which more frequently than ever now includes services, and in regards to transport this must certainly now be viewed to be the case. In general, the Uruguay Round was seen as the first step in a longer-term process of multilateral rule-making and trade liberalization, but observers agree that, while the negotiations succeeded in setting up the principle structure of the Agreement, the liberalizing effects have been relatively modest. With regards to services this is specifically true, and, arguably, there is far more work to be done per se with regards to aviation and achieving equity of services for both the operator and the recipient customer, specifically the customer.

That said, much in the same way as Grotius and Francisco de Vitoria had done centuries earlier, the General Agreement on Trade in Services (GATS) does recognise that services are the most dynamic element of both developed and developing economies with a natural link to goods; and, since 2000, services have become the subject of multilateral trade negotiations. However GATS recognises the complexity and diversity of services, and therefore specific divisions are made to in relation to certain services, such as telephone companies, banks, accountancy firms and airlines. The GATS annexes therefore reflect these different services' needs.

4.3. Air transport services – WTO (GATS)

The air transport services annex establishes that the GATS will apply to aircraft repair and maintenance services, marketing of air transport services and computer-reservation services. However, it specifically states that traffic rights and directly related activities are excluded from GATS's coverage, as they are party to other bilateral and/or multilateral agreements. In summary, arguably free trade and fair trade do not apply to all air services, certainly not under GATS, which also makes no provision with regards to dumping in this respect. The reason for this is that paradoxically this is arguably seen as part of the remit of the Convention on International Civil Aviation; but, in this regard, it is to be recalled that the delegates of the Chicago Conference could not reach agreement on the commercial rights of air transport.

Article 6 of the Chicago Convention is meek and mild in this respect; or, arguably, it could be said, appropriate, in stating that,

'No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.'

So, whilst the value of air services (collectively, perhaps seen as transport) is recognized in terms of the contribution made to the trade in goods – it is excluded from GATS and from the Convention (and arguably from the UN agency jurisdiction). Which equates to it being left to bilateral parties to negotiate, sometimes from a multi-lateral perspective, but never collectively amongst all parties to the Convention. Therefore, arguably competition is not fair and not equal; and therefore cannot benefit the pursuance of *liberalization of international air transport to the benefit of the economy at large (including all stakeholders)*.

5. Air Service Agreements

ASA's provide the means for States to mutually agree *rights* and are the method for regulating 'economic' cross-border services. The misnomer here is in the name, for, far from being a *right* – they are in fact *privileges*, relating to market access, furthermore, the degree of *freedom* granted is historically subject to protectionist conditions (which has included the caps on the number of flights, which is itself linked to frequency, the amount of passengers and/or cargo carried (capacity) and the pricing of the air fare).

ASA's can include other features too, such as incident investigation, safety and security, immigration, control of travel documents etc. As the WTO Working Paper⁵³ identified the specific provision and type of air service agreement in force directly indicates how regulated the market is. In this respect it is identified that there remains an 'intricate web of bilateral air services agreements' wherein, rules arguably unnecessarily limit liberalization of air transport service operations between countries.⁵⁴ Although the air service industry is recognised as being more liberalized than in 1946 when the first post-war Agreement was established between the US and the UK in the Bermuda I Agreement,⁵⁵ in essence, ASA's have not been transformed and significantly or substantially re-written to reflect this. However, conversely it is also argued that this more rigid approach left 'little room for unfair market practices, such as capacity dumping and public subsidization' and certainly not to the extent of affecting competitors.⁵⁶

That said, Havel and Sanchez argue that bilateral agreements have undergone a 'paradigm shift from over protectionism to an increasing widespread tolerance, even enthusiasm, for reducing barriers to international trade in air services.'⁵⁷ In reality, the middle line between the Working Paper and Havel and Sanchez is perhaps more accurate, with the 'enthusiasm' aspect remaining somewhat debateable. It is true that both the EU and the US have opened up their markets to a degree with both States' groupings' embracing more open skies policies; however, even within these more 'open' Open Skies agreements, protectionism mechanisms are still to be found. And, even between the US and EU, which laid historical footing and since arguably where most progression has been made, there remains a degree of mistrust and an underlying culture of protecting their 'own' market above all else. This can perhaps best be demonstrated through the talks for the second Open Skies agreement between the EU and US in 2010. During these talks both parties signed a Protocol to Amend the Air Transport Agreement ("Protocol") out of the second stage negotiations. The Protocol reflects the shared goal of eliminating 'market access barriers in order to maximize benefits for consumers, airlines, labor and communities on both sides of the Atlantic,'⁵⁸ whilst also providing specific opportunities and incentives for the parties to make further progress. And yet, the position of the US was noticeably different to the stance advocated in 1944, whereby full access had been proposed but not supported by EU nations (particularly voiced by Britain).

In the EU press release, following the conclusion of the talks, the following was advocated, and clearly stated, that although agreement has been reached there were:

'Other elements [that] 'will' enter into effect at a later stage as they are subject to legislative changes on either side:'

Namely,

- *'The reciprocal liberalization of airline ownership and control. This will require legislative changes in the US. Currently, foreign ownership in US airlines is limited to 25% of voting rights. Upon legislative change in the US, the EU will reciprocally allow majority ownership of EU airlines by US nationals.'*

- *'The right for EU airlines to fly between the US and a number of non-European countries (so-called 7th freedom right') as well as the removal of obstacles for European majority investment in third country-airlines by facilitating access to the US market. These rights are subject to legislative change in the EU concerning noise-based operating restrictions at airports.'*⁵⁹

However, arguably this was reported somewhat differently by the US press, who failed to mention the need for legislative provisions in order to achieve more equal reciprocity; and, some nearly five and a half years later, this has yet to materialize in terms of legislative changes leading to equal opportunity in terms of voting rights. Inevitably this leads to market distortion and at the very least the inability to compete fairly.

Within the revised Protocol it is stated that;

'Each Party shall allow a fair and equal opportunity for the airlines of both Parties to compete in providing the international air transportation governed by this Agreement.' (Article 2 - Fair and Equal Opportunity.⁶⁰)

The Agreement also clearly recognizes, within the preamble, that subsidies 'may adversely affect airline competition and may jeopardize the basic objectives of this Agreement.' And whilst 'dumping' is not specifically mentioned, Article 14 elucidates further the negative impact of subsidies. In doing so, it refers to an extensive consultation mechanism and provides a list of issues that may be deemed as unfair State intervention.

Arguably, as Bergamasco⁶¹ identifies, the EU-US agreement has a 'remarkable efficacy in confronting subsidies,' compared with other Open Skies agreements, which is seen as being a discouragement to the imposition of such and assists in allaying many of the concerns emanating from the sub-market failings following 9/11, which extra-ordinarily required national airlines in both the US and EU requiring assistance from their respective governments – arguably in the form of subsidies.

6. The EU⁶²

6.1. EU and ICAO relationship

The fact that the EU was a party to the Open Skies agreement conducted with the US is perhaps interesting. For, although the Chicago Convention lay virtually silent in respect to economical agreements, as referred to earlier, Article 6 does state that international air services may only be flown over the 'territory of a contracting state', with the 'permissions or other authorization of that State..... and in accordance with the terms of such permission or authorization.' However, only the 28 members states

of the EU are Contracting States to the Chicago Convention. The European Union, as it is now known today, did not exist until 10 years after the founding of ICAO. The Treaty establishing the European Economic Community was not signed until 25 March 1957, entering into force on 1 January 1958.⁶³ And whilst all EU Member States are members of the UN, the European Community has only had observer status at the UN since 1974. That said, the Lisbon Treaty states that ‘it shall be for the Commission to ensure the maintenance of all appropriate relations with the organs of the United Nations and its specialized agencies.....’,⁶⁴

Given this, the status of the EU at ICAO remains questionable, not least by the EU, which has sought to obtain Community membership of ICAO as a single entity. However, Article 92 of the Chicago Convention states that it is only open to States, and membership on a regional basis would arguably necessitate an amendment to the Convention to allow the EU membership in its own right. The consensus of the EU remains however that the role of the Community should be enhanced within ICAO. This situation put the EU on a precarious footing internationally and equally the Members States in terms of compliance with EU and ICAO requirements, which at times have not always been in agreement.⁶⁵

6.2. *The EU Transport Chapter*

Although the transport chapter was a cornerstone of the EU, for the first 30 years of the European Community, the transport policy remained virtually under the control of individual governments. Within this period it is acknowledged that the European Community was either unwilling or unable to implement the Common Transport Policy (CTP) as provided by the Treaty of Rome.⁶⁶ As a consequence, geographical factors, as well as political decisions, had an impact on each Member State prioritizing and developing transport modes nationally. This diversity led to distinctive features within each Members States national transport policies and for a period of time this was not conducive to facilitating integration. Title VI, Articles 91-100 of Treaty of the Functioning of the EU⁶⁷ (TFEU) relate to transport and Article 91 TFEU specifically refers to the ‘distinctive features of transport,’ and, although not specifically defining these, it is potentially an acknowledgement of the complexity of the transport sector. Aviation, like other transport modes remains both an ancillary activity to other sectors and yet it is also a major industry in its own right. In the 1980’s however it remained fragmented, hampering the progress towards the objective of achieving a single market. In a bid to achieving this, the EU adopted the Single European Act (1986)⁶⁸ which was seen as a vital component in making a frontier-free single market by the end of 1992 a reality. This in turn led to the creation of a single market for aviation in the 1990s and removed the commercial restrictions for airlines flying within the EU. Up until that point many airlines had been subject to heavy national subsidies and government ownership.

The 2002 so-called ‘*Open Skies*’⁶⁹ judgment clarified the position of the EU and its Member States in respect to ASA’s with international countries; and, in so doing, concluded that the EU needed to act collectively, so as not to discriminate or act unfairly against Members forming part of the Union. This was reinforced by a subsequent Regulation,⁷⁰ which referred to the fact that the Commission had the power to negotiate ‘horizontal’ ASA’s, which referred to the ‘Union Clause’ in respect to airline ownership and control. As a consequence of this development ‘the European Union has created the world’s largest and most successful example of regional market integration and liberalization in air transport.’⁷¹ Therefore, in this

regard at least, within the European Union there is a level playing field for EU carriers. The irony and paradox being that, in many ways the liberalization within the EU has demonstrated to the Contracting States of the International Civil Aviation that liberalization of the air transport is possible and does reap rewards; but, in essence, to ultimately be fair - this needs to be applied internationally and not just on a regional basis. As Bergamasco commented, whilst other countries still resort to unfair advantages, '[t]he most harmed actors are the European airlines, which by contrast are subject to strict rules on fair competition and State aid.'⁷²

6.3. EU Competition Law

The Treaty of Rome embedded the aspect of competition within in it, and hence it has been a fundamental policy pillar ensuring a fair and equitable market internally, that would be not be distorted by the domestic arrangements of Member States.⁷³ The principal concerns regulation of competitive markets within the EU, so as to prevent practices that would damage the economic interests and competitive practices of a united Europe. The applicable Treaty provisions are Articles 101-109 (TFEU) as well as a series of Regulations and Directives.

As the Commission summarizes,⁷⁴ the main rules relate to the fact that businesses;

- *'may not agree to fix prices or divide up markets amongst themselves (Article 101 TFEU);*
- *may not abuse a dominant position in a particular market to squeeze out smaller competitors (Article 102 TFEU);*
- *are not allowed to merge if that would put them in a position to control the market. Larger companies that do a lot of business in the EU cannot merge without prior approval from the European Commission — even if they are based outside the EU (the merger regulation).'*

The aim is to provide 'everyone in Europe with better quality goods and services at lower prices.' And, the focus continues to be on the following activities:

- *'the fight against cartels;*
- *the prevention of dominant companies abusing their market power in any sector or any country in Europe;*
- *rigorous scrutiny of proposed mergers;*
- *the control of state support for sectors and companies that risks distorting competition.'*

Article 107 TFEU also relates to government state aid to business, which is monitored by the Commission and the following examples, are forbidden unless they comply with certain criteria:

- *'loans and grants;*
- *tax breaks;*
- *goods and services provided at preferential rates;*
- *government guarantees which enhance the credit rating of a company compared to its competitors,' etc.*

Additionally, no state aid in any form may be given to ailing businesses that have no hope of becoming economically viable. Whilst many of the general state aid rules

remain applicable to the transport sector, there are also some specific sectorial rules too (including for air transport).

Nevertheless, on occasions, there has been some tension between the EU and Member States due to the ‘subsidiarity’ principle⁷⁵ and demarcating jurisdictional boundaries between national competition authorities and the European Commission.⁷⁶ As the EU Commission explains, ‘with the growth of the internal market and globalisation, the effects of illegal behaviour, like running a cartel, are often felt in many countries across the EU and beyond.’⁷⁷

It should be recalled however, that the ‘*Open Skies*’ judgment was based on the infringement of the right of establishment, being a case of discrimination, which excluded air carriers of other Member States from the benefit of national treatment in the host Member State, which is forbidden by the Community rules on the right of establishment.

Following the Court of Justice of the European Union (CJEU) ruling, the then Vice-President, Loyola de Palacio, stated that this should be viewed as a ‘major step towards developing a new coherent and dynamic European policy for international aviation.’⁷⁸ This subsequently led to a ‘Road-Map’ for the EU external policy, consisting of three main thrusts:

- 1). Bringing existing bilateral air services agreements between EU Member States and third countries in line with EU law
- 2). The creation of a true Common Aviation Area with the neighboring countries
- 3). The conclusion of aviation agreements with key strategic partners

In 2012, some ten years later there was a review of the EU External Aviation Policy,⁷⁹ in which the challenges still faced were identified. This also discussed the difficulties encountered and some of the actions already taken in order to assist remove some of the molehills still found in the playing fields.

6.4. EU External Aviation Policy – challenges

Firstly it is acknowledged that the last two decades have witnessed unprecedented success in Europe specifically by the removal of historic barriers. However, Europe was also very heavily hit by the impact and consequences of the global recession, during this period, which has resulted in residue challenges. The 2012 EU Communication argues that the EU's external aviation policy needs ‘a major and rapid transformation to meet these challenges’ in order that, Europe ‘maintain[s] a strong and competitive aviation industry at the centre of the global network that connects the EU with the rest of the world.’⁸⁰

Europe's airlines are said to be ‘on the front line of this competitive challenge’ era, and are said, to be ‘fighting to survive in a tough international market that is characterised by diverse regulatory frameworks and cultures, by bilateral air services agreements which restrict market access, and by competition that is often distorted in third countries by unfair subsidies or practices such as over-flight restrictions.’⁸¹ This echoes the sentiments of Bergamasco and is potentially a stark reminder of the

unfairness that results from ‘arguably’ being one of a few regions to actually be fair (or fairer than most).

In response to ICAO’s Vision statement the EU Members States at least have actively ‘resolve[d] to pursue the continuous liberalization of international air transport’ arguably for the EU economy in the main, but with consideration to the economy at large, and they have adopted and pursued ‘the principle of fair and equal opportunity for all States and their stakeholders.’ The degree that this has been applied, with consideration to the EU (EEA) States in preference to all the other ICAO Contracting States, debatably perhaps remains questionable. But that said, as a consequence, the EU has been subject to less fair treatment where other States have openly and covertly subsidized their national airlines. Whilst the EU may have shown leadership in pursuing an ambitious and coherent international aviation policy, it has ultimately also been at its expense on occasions too. It may be playing cricket by the rules (or in this case by the ICAO Vision statement) but it is still negotiating a playing field that is full of molehills, and, hence, far from level. For whilst the EU considers open markets the best basis for developing international aviation relations, the ability to compete fairly internationally is being hampered and affecting competition. The EU reinforces that its EU’s external aviation policy must stress the importance of fair and open competition and states that whilst subsidies, unfair practices, inconsistent application of regulatory frameworks and lack of transparency in financial reporting of companies are used to distort the market, it believes it has a legitimate right to defend the industry against such unfair competition.

6.4.1. Protection against subsidization and unfair pricing practices

In a response to concerns about unfair pricing practices by certain non-EU carriers on the transatlantic market, the EU adopted Regulation (EC) No. 868/2004 (ASR), which aimed to address the injuries caused to Community air carriers in the supply of air services from countries not members of the European Community.⁸² This was particularly driven by the difficulties of air transport after 9/11; nevertheless, this had the intention of redressing such practices across the board. Richard Janda,⁸³ stated that this was because the Commission ‘envied’ the US’s ability under the International Air Transportation Fair Competition Practices Act of 1974 (IATFPCA),⁸⁴ but in reality, regardless whether this assertion is true, it, was, at least, seen as a means to ensure a degree of equilibrium in the playing field. Title 49 of the US Code states that ‘an air carrier or foreign air carrier may not subject a person, place, port or type of traffic in foreign air transportation to unreasonable discrimination.’⁸⁵ And as Janda also contests, the ASR provided the means to fire a ‘shot across the bow’ of the US,⁸⁶ which may have just been the impetus needed in regards to the negotiations for the second EU-US agreement. It clearly, if nothing else, sent out a defined message, namely that the EU would give itself the means to take decisive action in redressing injury caused by foreign subsidization and unfair pricing practices. Like the US, which has rarely needed to resort to the respective legislation, the EU has never reverted to the need to take action under this Regulation, both choosing instead to pursue more formal (not legislative) complaints – nevertheless, Janda refers to the US’s ability under its Code, as a ‘sleeping giant’ rather ‘than a paper tiger.’⁸⁷ Arguably, the EU’s reluctance to utilize the ASR, could be perceived as a mistake, or weakness by the EU, certainly it confirms the ASR to be a ‘paper tiger,’ especially given that it continues to battle alleged unfair practices from some countries and areas (for example, arguably, the Gulf nations). That said, the main difference between the

US and EU is that the US has on most occasions, always ‘pro-actively’ equipped itself with the means and mechanism to protect its services and industry in advance, and has also shown that it will apply any means, if need be, to protect – *take for example* 1978. In the year that saw the Airline Deregulation Act, the US also implemented the means to protect failing airlines, through the Chapter 11 bankruptcy protection provisions⁸⁸ - Was this coincidence and very good timing? Inevitably did the US perceive the risk that deregulation and liberalization may cause to their airlines; and, hence provide the means to mitigate and compensate for this, namely, through suspension and ‘reconstruction of airline companies?’ And, if so, was this unfair / distorting competition? Inevitably, this should perhaps be viewed as a clear indication of a paradox of virtue!⁸⁹

The same question could equally be posed in terms of dumping and whether this is indeed anti-competitive; and/or whether it is the response of governments that actually is the anti-competitive element, whereby governments resort to take action against dumping in order to defend their domestic industries? And, has this ultimately led to a paradox of European virtue?

Regulation (EC) No. 868/2004

The legal basis for Regulation 868/2004⁹⁰ was Article 80 TEC / 100 TFEU (& 251 TEC - 294 TFEU) and hence this emanated from the Transport Chapter. It is important to identify that maritime already had a maritime regulation (MR) to address unfair practices via this mode of transport, whereas air transport did not.⁹¹ So on the surface at least, the ASR appears a logical development for the airline industry. And in fact, the ASR responded to the Community airlines, which were feeling the pressure due to non-EU airlines reduced ticket pricing, to which they were unable to respond. In proposing the ASR, it was reinforced that the WTO through GATS failed to provide the mechanism to address the concerns relating to ‘dumping;’ and, hence bilateral agreements were the only means to address these concerns. However, in this respect, on many occasions, the ASA’s continually have lacked the terms of coverage or provided the remedies to do this, and have therefore not afforded the needed ‘*protection.*’

The ASR could be viewed as having been developed based loosely upon the WTO provisions. In comparison with the MR, the ASR is arguably much tighter in terms of being restrictive to the EU and not providing the means to take the decisive action it perhaps wished to (or the actions the airlines wanted it to take). Whereas, the MR referred to unfair practices only (not subsidies) and then went onto say that these related to practices that would cause or threaten to cause major injury to EU ship owners; however, the ASR referred to both subsidies and unfair pricing and in actual fact tied both elements in together with regards to the discriminatory practices. Meaning that, the implication was that the price dumping needed to be shown to be directly linked to a subsidy, ‘subsidization or other forms of aid granted by a government or regional body or other public organization of a country;’⁹² although, there was perhaps slight latitude in the next part of the definition, namely the form of assistance which could be a ‘subsidization or other forms of aid granted by a government or regional body or other public organization of a country.’ However this latter avenue would still not cover practices from a non-state owned airline that was prepared to sell fares at a loss (loss-leader). That said, Article 2 provides some mechanism for maneuvering, stating within the ‘principles,’ that redress can be taken

for unfair practices (without restrictions) if there is an unfair pricing practice, which is not tied into a subsidy (note the end of section 1 finishes with ‘*or*’ not ‘*and*’).

‘A redressive measure may be imposed for the purpose of offsetting:

1. a subsidy granted, directly or indirectly, to a non-Community air carrier; or
2. *unfair pricing practices by non-Community air carriers;*’

Whereas, that said, Article 5 within ‘unfair pricing practices’ tends to again join the two requirements back together:

‘1. Unfair pricing practices shall be deemed to exist on a particular air service to or from the Community where non-Community air carriers:

- benefit from a non-commercial advantage, and
- charge air fares which are sufficiently below those offered by competing Community air carriers to cause injury.’

Although the ASR is still in force – it has however virtually been dumped by the EU.

In 2013 a Road Map from The Commission⁹³ referred back to the Future Challenges faced by (EU) External Aviation⁹⁴ and the effectiveness of the ASR in assessing the impact of the rapid emergence of some foreign air carriers (citing particularly the Gulf area). It considered specifically the need to address how best to ensure fair competition in international air transport including through the revision or replacement of Regulation 868/2004. The Commission reinforced the views of the industry, identifying that there were fundamental difficulties in applying the ASR. Citing in particularly the following points:

- (1) The current EU legislative framework does not ‘*guarantee*’ protection of EU air carriers against subsidization and unfair pricing practices from third country airlines.

This potentially is an indicator of the comments made above – namely that the phrasing of the ASR is very restrictive. That said, should it actually ‘*guarantee*’ protection per se? A case-by-case review should be undertaken in order to determine the circumstances and whether any action is needed.

The important emphasis is that price dumping by itself is not necessarily an unfair practice, and certainly many passengers would welcome lower prices. There is a natural conflict here between the wants of the EU airlines in preserving their business and ensuring maximum profits; and the demands of customers who inevitably want lower prices (including if that means that an airfare has somehow been subsidized by an overseas government). However, in stating that the current ASR provides no guarantees, implies that the EU airlines are not so concerned with the subsidy element, they are rather more concerned with lower fares and opportunities being offered by non-EU airline in what they perceive as ‘their liberalized arena and market’ (which they are unable to undercut, or defend).

- (2) The EU industry argues that the ASR is not practicable, as it has been modeled on the WTO and the respective tools used in anti-dumping actions for goods, which have not properly adapted to the specificities of the air transport sector. Reinforcement is added that it is difficult for EU stakeholders to use the ASR as the defenses relate to trade in goods (for example

identifying "like air service" which would be difficult, if not impossible, to apply in air transport).

Of course, amending an EU legislative instrument (such as the ASR) may not be the fairest method and certainly it is not the only method to consider either. In respect to ICAO's vision, there may be better means of pursuing continuous liberalization, which is aimed at benefitting *the economy at large and providing equal opportunities*. Arguably a fairer method would be to ensure that ASA's are more consistently written and that they are multilateral, and not of a bilateral nature. Another alternative proposition would be to consider subsidies and unfair pricing for air services under GATS or some other international mechanism, whether this is part of a new ICAO remit, or through the creation of a specific body. Inevitably there is a need for a defined process, (wherein any alleged subsidy is notified) a means to monitor (which considers each incident on a case-by-case basis) and an address/redress system. However, regardless of the mechanism used to safeguard activities (good and services) from subsidies (which are viewed as negatively affecting competition and distorting the market) the fact will no doubt always remain - that it is very difficult to actually prove subsidization from respective governments without clear evidence and supporting data. Mix into the equation lower fares and the matter becomes even more contentious and difficult to resolve.

So is there actually a need to tackle the dumping of airfares? After all, is this not actually the concept of competition? And, what if revisions were based from a customer centric viewpoint and the end-user became the primary concern? It should be recognized that any revisions must factor in the needs of the customers, so what if the revisions advantaged the customer – after-all, this could also be viewed as stimulating the market, leading to an increase in trade, and services, which in itself therefore would directly impact on the GDP of a country (even if this does mean that the customer uses an external – third party airline in the equation). Inevitably, this could also be viewed as leading to an increase in airline competition – even if it were to be based on low prices!

Currently, Article 16 of the ASR provides that (in reference to Articles 10(1), 11(2) and 12(1)) the Community needs to determine if there is a need for intervention, or whether measures should be maintained in accordance with Article 14(2) - which is based on an appraisal of all the various interests taken as a whole. In essence, this is very much what is being advocated here – namely, that if the interests of the customers were always put first – then the '*economy at large*' would potentially benefit long-term. Arguably, this differs from what the industry wants and is advocating, namely that it should be the primary stakeholder that is 'protected.' Inevitably there is fine line between a provision that 'arguably' looks to level the playing field - *in terms of a practice, which the airline perceives as dumping*; and, a mechanism that, in rectifying a perceived mal-practice, actually becomes unfair.

The question therefore remains - *is dumping actually anti-competitive?* Can equilibrium ever be achieved between all stakeholders, including the customer, in the face of a more liberalized setting; after all, this remains the ICAO and Contracting States vision.

7. ICAO

ICAO states that it works both with the contracting Member States and industry groups to reach consensus on certain international civil aviation matters appertaining to ‘Standards and Recommended Practices (SARPS) and policies in support of a safe, efficient, secure and economically sustainable and environmentally responsible civil aviation sector.’⁹⁵

Economic Development of Air Transport is specifically listed as one of the five identified current Strategic Objectives set by ICAO (for the period 2014-2016). The importance of economic development as a ‘key’ element has been strengthened over recent years, and certainly arguably since the 1944 Convention.

In the first Strategic Action Plan (1997) acknowledgement was given to the fact that during the period 1944 through to 1997 membership of the Chicago Convention had grown from 52 States (which attended the Chicago conference) through to 185; and hence, there was a need to meet all Contracting States requirements and to ‘respond’ to the future major challenges for civil aviation. Specifically it was said that, ‘*Civil aviation has been swept up in a wave of commercialization, globalization and transnationalization.....*’ A strong and powerful statement; however, perhaps weakened by the fact that it actually continued by directing this specifically towards safety and security implications. That said, the Action Plan reinforced the responsibilities of the Member States and acknowledged that, although ‘ownership and operations of airlines, airports and air traffic control devolve from governments,’ there remained ‘the need for seamless co-ordination beyond national and regional borders.’ This is certainly reinforced in the current objectives, wherein it is stated that there is a ‘need for ICAO’s *leadership in harmonizing*’ air transport within the economic policies and supporting activities framework. Certainly this builds upon recent issues raised by ICAO, and during the 2003 Fifth Worldwide Air Transport Conference concerns were specifically raised in respect to ‘the damage in the fair market order occurring from dumping and price discrimination in the liberalization and alliances expansion process.’⁹⁶ Thus once again showing the conflict between liberalization and anti-competitive protectionist practices.

7.1. ICAO Long-Term Vision for International Air Transport Liberalization

The collective vision statement of ICAO Members states:

*‘We, the Member States of the International Civil Aviation Organization, resolve to actively **pursue the continuous liberalization** of international air transport to the **benefit of all stakeholders and the economy at large.**’*

*‘We will be guided by the need to ensure respect for the highest levels of safety and security and the **principle of fair and equal opportunity** for all States and their **stakeholders.**’⁹⁷*

This ‘Vision’ aligns to the objectives of ICAO’s transport and regulation program, which are to:

- reduce State’s costs in performing its economic regulatory functions;

- increase consumer's benefits and choices;
- improve air connectivity; and
- create more competitive business opportunities in the marketplace;

All objectives have the aim of 'contributing to the sustainable economic development and to the expansion of trade and tourism.' However, there remains clear policy conflict in the vision and the objectives. Although liberalization is to be pursued, there remains an underlying proviso and undercurrent of limitation – namely, that liberalization must not negatively affect national carriers. Arguably, the same could be said in respect to competition and particularly price dumping. It may be argued that long-term, customer choice 'could' be affected, 'if' price dumping causes the market to be limited due to a restricted number of suppliers, but it is doubtful whether this risk has ever been calculated or forecast. Certainly in the short-term, such price-cutting of fares 'benefits' customers. With more access to overseas suppliers there is also the opportunity for added connectivity and more competition, which stands to be positive in terms of trade, and tourism – both of which must be seen as falling within the scope of sustainable economic expansion.

ICAO identifies five primary areas where focus on liberalization of international air transport services is directed. However, arguably, only the first one seems to show a committed intent namely;

(i) *through the development of policies and guidance* aimed at harmonizing the global regulatory framework.⁹⁸ This shows a determined tone, but that said, ICAO has to work alongside the Members States, and inevitably visions and objectives will only be as successful as the Contracting States allow them to be. And as seen above, the Member States seem to persistently struggle to allow open competition. Any perceived risks, which would harm their national industry, are met with protectionist mechanisms.

The remaining four key areas are phrased around ICAO's expertise and mediating abilities in terms of:

(ii) providing practical solutions to confront global emerging regulatory challenges. And, although ICAO is 'offering' its knowledge and the willingness to facilitate what can ultimately only be seen as compromise agreements – the focused areas, where challenges are anticipated, are centered around more contentious commercial aspects, such as market access, the ownership and control of air carriers, consumer protection, competition, trade in services as well as the assurance of other 'essential services.' So, it remains questionable how much can actually be achieved when these areas are continuously held so 'dear' to, and protected by, the Contracting States.

Likewise, the other identified areas continue to use 'soft' language in terms of,

(iii) 'enhancing transparency' – through the *dissemination* and *exchange* of policies and practices.

(iv) 'facilitating States' air services negotiation and business networking – identifying specifically the aviation industry, international organizations, tourism and other stakeholders;

And,

(v) 'serving' as a global forum for cooperation and concerted actions – however, in this sense, it could be said that this is not a new remit and also could be viewed as incorporating the identified areas within (ii), (iii), and (iv).

The objectives may point to the fact that ICAO aims to take *leadership in harmonizing* economic activities and the respective liberalization, but the fact remains that as a consequence of non agreement at Chicago in 1944, ICAO has very limited means in which to actively drive economic pursuits, save for the consent of the Contracting States; and although the landscape may have become ‘*swept up in a wave of commercialization, globalization and transnationalization*’ the number of States party to the agreement have swelled considerably. If agreement was hard to achieve when the number was at 54 it is arguably three times as difficult with the number at 191.

There also remain other policy paradoxes. Since the 2003 Fifth Worldwide Air Transport Conference, ICAO may be stating that it is geared towards the promotion and implementation of assisting States in the liberalization process; however, this can only successfully be achieved when each contracting State *agrees* as to what liberalization actually entails and whether, and how, ‘national’ airlines can/should be protected.

Whilst the vision is the pursuit of liberalization, it remains questionable as to which stakeholders should be protected or benefit through certain mechanisms, which allegedly seek to address anti-competitive behavior, such as price dumping. Hence, there remains policy conflict in certain measures that are geared towards leveling a perceived imbalance. Whilst ICAO identifies that consumer protection has increased, this to start with has not been fairly and consistently implemented across the globe, (with the EU arguably taking the lead in this respect⁹⁹). ICAO’s News Release, in July 2015, identified this concern and emphasized that as part of the ‘Long-term Vision for International Air Transport Liberalization’ there was a need for States to pursue more aligned approaches for consumer protection.¹⁰⁰ The principle of air transport consumer protection covers three phases, the ‘before’, ‘during’ and ‘after’ travel elements. However, the opposite of customer protection is discrimination and anti-competitive behavior, which therefore closely aligns to the policy paradox in respect to the ‘before’ element of travel – i.e. pricing, and specifically price dumping. Any ‘*retaliatory*’ action taken by a national (or EU) government would negatively effects the consumer, who would not be able to benefit from outside airlines offering lower fares (regardless of whether this was through a subsidy or loss-leader concept).

8. US-Gulf Carrier seat dumping claim: A paradoxical case study!

There is perhaps even more irony associated with this when recent events in the US are considered. Similar to the EU, the US has expressed concerns as to the alleged subsidies provided to Gulf carriers and the associated impact within the US market. The big three US carriers Delta, United and American have particularly voiced concerns that the Persian-Gulf carriers (the big three Gulf competitors being Qatar Airways, Emirates Airlines and Etihad) are “dumping” seats in the US.¹⁰¹ Whilst these allegations may have lingered since the start of the millennium, momentum was particularly increased during 2015. This has led to views being invited from interested parties by the Department of Commerce (DOC)¹⁰² which has seen workers of airlines and trade and industry bodies plus adjacent industries responding. The Gulf carriers are of course in direct competition with the American rivals on international routes. However, in a letter dated June 16, 2015, the three US airlines stated their support for open skies and the further expansion of such.¹⁰³ However, they do stress the

importance of operations based on a level playing field. In many ways the term ‘level playing field’ becomes problematic to determine – with counter allegations being made against the US carriers for alleged assistance from the US authorities, particularly in the aftermath of 9/11. There is no doubt that US airlines benefited from the Chapter 11 bankruptcy protection system, which proponents claim is another back-door subsidy method. However, the US would contest that this is a fair comparison, whilst also presenting the argument that Chapter 11 re-structuring is not recognized to be a subsidy. In May 2015, Etihad released its own report, in which it expressed the opinion that Delta, American and United had received more than \$70 billion in subsidies since 2000, mostly in the form of pension guarantees and creditor protections in bankruptcy.¹⁰⁴ And, this was given credence by the European International Aviation Group (IAG) report, which responded to the US DOC.¹⁰⁵ In the response it stated that IAG competes successfully (profitably) with all of the three major Gulf carriers, pointing also to the fact that British Airways has competed with Emirates directly, for over 25 years. The Group stated that although not defending specific carrier, it did wish to address the principles of open skies which it wholeheartedly supported; and, in this regard, IAG referred specifically to the Open Skies policies pursued by the US Department of Transportation (DOT) which states,

‘Open Skies agreements have vastly expanded international passenger and cargo flights to and from the United States, promoting increased travel and trade, enhancing productivity, and spurring quality job opportunities and economic growth.’

Continuing that,

‘Open Skies agreements do this by eliminating government interference in the commercial decisions of air carriers about routes, capacity, and pricing, freeing carriers to provide more affordable, convenient, and efficient air service for consumers.’

The response from IAG reinforced the impact to the US economy which is resulting in ‘enormous benefits’ to US consumers, leading to enhanced trade and tourism – all of this sitting comfortably within ICAO’s aim of ‘contributing to the sustainable economic development and to the expansion of trade and tourism.’

Figures from the US-UAE Business Council would seem to support this suggestion with reports in 2014 stating that ‘[t]he United Arab Emirates (U.A.E.) remains the top United States export destination in the entire Middle East North Africa (MENA) region for the fifth year in a row.’¹⁰⁶ In 2013 the US-UAE shared a record \$26.9 billion in trade, with the U.S. exports to the U.A.E. reaching a record \$24.61 billion.

The 2015 data shows a similar rising trend (*comparison data available from the US-UAE Business Council*): **Table 1.**

Month	Import	Export	Balance
Jan	1,864.6	202.3	1,662.3
Feb	1,731.0	192.3	1,538.7
March	1,937.5	266.6	1,670.9
April	1,712.5	243.4	1,469.1
May	1,623.3	217.6	1,405.8
June	2,030.5	172.4	1,858.1

July	2,085.5	220.9	1,864.6
August	1,609.5	187.5	1,422.0
TOTAL (For months indicated)	14,594.5	1,703.1	12,891.4

Table 1: US trade in goods with the UAE
(Data from US-census.gov¹⁰⁷)

As IAG enforce, there is a direct correlation between the growth in trade, from \$3.6 billion in 2004 to \$24.6 billion in 2013, which coincides with the start of direct flights between the two countries.¹⁰⁸ The contribution made to the US economy by orders of Boeing aircraft and the thousands of jobs that have been boosted through the links between the US-UAE is particularly shown to be significant to both the trade growth and directly to the airline industry.

The IAG report also points out that the allegations made with regards to subsidies received by the three Gulf-carriers are misleading; and, it is quite strongly voice that the group has ‘*serious doubts*’ over the information presented by the US carriers, which ‘*do not withstand scrutiny*’ and is ‘*heavily caveated*.’ Counter-allegations are also made regarding the distortion of the information used, which is said to be ‘*inaccurate and misleading*.’ The response also points out that there are potentially only a few carriers in the world that have not benefited at some time from government support and that the Gulf States are no different. In doing so the reply directly cites concerns over the US Chapter 11 reorganization mechanism, federal tax dollar support for research and development, pension provisions, etc.

Whilst these ‘tit-for-tat’ allegations linger on, the fact remains that there are inevitably transparency issues for all parties, who use clever means to circumvent competition rules and principles so as to protect ‘their’ airlines. This said, there was perhaps a glimmer of hope in 2016 when the US Senate approved the Aviation Innovation, Reform and Reauthorization Bill, which would no doubt see further investigation into such practices, including the effects to customers.¹⁰⁹

8.1. *Passengers!*

Whilst trade has steadily increased year-on-in, the consumers have also reaped the rewards through the increase, both in trade and the related opportunities, as well as through the direct benefit of ‘new flight and routes’ and the increased competition. And in essence, this remains the real issue of the US carriers – disputably, regardless of whether this is, or is not, related to an underlying practice of subsidies. The US-Gulf States disagreement is arguably similar perhaps to the views expressed by the EU airlines to the EU Commission in respect to the ASR and the fact that sufficient ‘protection’ is not being accorded to ‘their’ industry in ‘their playing-fields.’

However, as IAG stated – ‘passengers do not “belong” to any particular airline or group of airlines.’¹¹⁰ And, arguably they do not belong to a particular country or region either.

The principle of free trade is that it benefits both the merchants and hence the end-users, the customer; and, equally this concept should be applied to services. But the continued mechanisms put in place, or advocated, seem to constantly be directed to

ensuring that passengers stay loyal to an airline/country (or region).

With ICAO reinforcing the need for more aligned policies for consumers alongside the liberalization element of the Air Transport Policy and Regulation strand (within the Economic Development of Air Transport objective) there is a need to ensure that the customer becomes an equal beneficiary of the associated benefits. Inevitably price transparency and connectivity is seriously compromised when protectionism comes before the customer.

In 2015 whilst the DOC were reviewing claims from the major three US airlines over subsidy allegations and price dumping on their soil by the Gulf carriers – ironically – the same three US airlines were also charged with fixing ticket prices for their ‘loyal’ customers – with at least two separate incidents being filed. In July 2015 it was reported that the Department of Justice (DOJ) was investigating American, Delta, United and Southwest airlines for potential unlawful coordination (price collusion).¹¹¹ All four airlines were named in three antitrust (anti-competition) lawsuits filed by consumers. The three complaints alleged that there was a conspiracy to fix passenger air prices by limiting seat availability; and, that, there were far from transparent practices regarding available information relating to pricing information in order to keep fares artificially high. Information also stated that between 2009-2014 the average domestic airfare rose by 13 percent. Of course with the internal domestic market heavily protected through national carrier operations the potential for price-fixing increases, but conversely, when presented with outside competitors on international routes, which sees the reduction in fare costs through added competition, there is the tendency and likelihood to respond through crying abuse of subsidies. This resulted in lawsuits being filed in various US jurisdictions, with allegations linked to the respective US competition legislation.¹¹²

The same US carriers, joined by JetBlue, were also subject to a further complaint concerning irregular fares in the period after the Amtrak derailment in May 2015, which saw the shutting of the Northwest Amtrak Corridor.¹¹³ In response to the complaint, the US Transportation Secretary stated, ‘[t]he idea that any business would seek to take advantage of stranded rail passengers in the wake of such a tragic event is unacceptable.’ Reinforcing that the DOT ‘takes all allegations of airline price-gouging seriously...’¹¹⁴

Regardless of the judgments, these allegations tend to reinforce the need for air-transport customers to be put first and certainly, in many instances, before the respective airlines or governments. There is a stark contrast between the alleged allegation and practices of the US airlines and the US Gulf ones perhaps, certainly in terms of customer satisfaction. For example, whilst the Gulf carriers have increased the destinations and choice for customers wishing to venture outside the US they are also renowned for this level of customer service. In the Skytrax, World’s Top Airlines listings¹¹⁵ (2015) – the *Oscars of the aviation industry awards*, Qatar Airways took 1st position, with Emirates at 5th and Etihad Airways in 6th position. The US were way outside the top 20, in fact, just scrapping into the top 50 - with Delta taking the 45th placing, JetBlue – 50th, and 60th, 67th, and 79th occupied by United, Southwest and American Airways respectively. The EU carriers equally trickled in from the 12th position onwards. That said, in previous years the EU carriers have at least taken first place, whilst it appears that no US carrier has ever achieved this

accolade and distinction.¹¹⁶ This becomes even more concerning in terms of profitability vs. customer satisfaction, as North American carriers continue to deliver the industry's strongest financial performance, with an estimated net profit of \$22.9 billion being reported for 2016 which will be an improvement on the \$21.5 billion reported for 2015.¹¹⁷

However, the irony and paradox in this respect is that whilst North America is set to retain the honor of being the most profitable region – customer satisfaction remains low, certainly in the US; and, it would therefore have to be questioned where the honor is in these statistics overall? Whilst the picture should be positive for the US traveler, customer satisfaction would indicate that this is not the case and that high profits are not being returned, and in fact, based on the filing of the recent court cases (as above), there are indications of price collusion which seek to increase the profit for the airlines to the detriment of the customer.

The argument being that in a competitive world, where choice and competition is 'freely' available, the customer will speak by their actions – which is perhaps where the concerns of the airlines lie.

9. CONCLUSION

The vision of ICAO members seems in radical contrast to many of the practices currently being implemented or voiced in terms of expanding the liberalized setting and providing benefits to all stakeholder and the economy at large. Whilst 1944 showed the inability of delegates to agree in terms of the economical aspects of aviation, it remains highly questionable as to the ability of the Contracting States to apply the *principle of fair and equal opportunity for all States*, in 2015 and beyond.

Much in the same way as the early critics and skeptics did not receive or welcome the practice of free-trade in goods, the same is clearly able to be said in terms of air transport services. Whilst gradual liberalization may have taken place, the underlying concept of protectionism still exists, albeit, that this should be viewed now as 'selective protectionism;' but none-the-less, the impact remains equally harmful. The results are still a fragmented industry with restrictions to international air transport links, which impact on trade in the global economy. The most harmed party arguably is the customer, who remains subject to the controls of the industry and the responses of the governments.

There are absurdities and paradoxes in terms of increasing trade and exports and protecting local markets and imports – this is particularly apparent and true in respect to airline services. Country and regional disparities constantly arise in terms of 'tricks and methods' employed to support 'their own industries needs' and this is often seen to be at the detriment to the customer, with perception as to 'aid' and the consequences of such, being interpreted so as to favor and support local suppliers. Price dumping is on many occasions seen as a negative consequence of competition and one that has to be stamped out, so as to preserve local jobs, yet, the positivity of these opportunities are overlooked and the advantages brought are far too easily dismissed. In the nine year period from 2004 to 2013 exports to the UAE from the US increased by 6-fold, making the UAE the largest export market in the Middle East. Inevitably this assisted the US economy and with the increased services to and from

the Gulf States and their networks, it also provided US citizens with unprecedented travel opportunities as well as reaping the benefits of increased tourism to the US.

The same can arguably be concluded with regards to the EU, which is experiencing a changing landscape and increased competition from transport providers outside the EU on international routes. The possible exit of the UK from the EU aviation scene remains arguable another potential minefield to be negotiated in terms of where the UK ultimately positions itself.¹¹⁸

Whilst several key speeches (delivered in October 2015) by the EU Competition Commissioner Margrethe concerned the level playing field being green in relation to an adjacent policy area – a decarbonized economy, there was a both a stark contrast and yet similarities in terms of the challenges identified and the successes achieved. The speech factored internal and external policies, and concerns were identified in terms of subsidies, which it was hoped, she stated, would not ‘tilt the playing field in Europe’s Single Market,’ through rivals not playing by the rules and engaging in anti-competitive behavior then not wanting to come clean about their activities.¹¹⁹ She also spoke about the importance of competition and the need to keep markets fair, level, and open, which was important to the economy and society, stressing ‘the primary goal is preserving good competitive conditions in the markets, which translates into lower prices, better quality and wider choice for consumers.’¹²⁰ The principle remains the same whether applied internally or externally; so if the successes within the EU are recognized in terms of the European Union creating ‘the world’s largest and most *successful* example of regional *market integration and liberalization in air transport*,’¹²¹ there would seem obvious logic in advocating more liberalization and open access to markets across the globe (much in the same way the EU has done internally). Inevitably, this should reap the same advantages and successes on a larger, international scale. The paradox here being that, as it currently stands, due to the extensive liberalization of the EU internal market and its strict rules on fair competition and State aid, as Bergamasco identified, it potentially is at more risk of being harmed and disadvantaged than its competitors.¹²² In this respect it would have to be concluded that the international airline arena is far from level, and doubtfully will ever be green. Consequently perhaps, the EU continues to analyze the EU External Aviation Policy Package and the impact of the predicted growth (based on the period of 2011-2030) in particular from India and China of 7.5% and 7.2% respectively, which will result in a relative shift to areas outside the EU, with Asia and the Middle East expected to become the focus of international air traffic flows.¹²³

This presents a real challenge to Europe and arguably a risk to the EU carriers. This will no doubt play a factor in the new EU comprehensive aviation strategy (December 2015), which will need to address both liberalization and competitiveness. Whilst the EU continues to embrace competition and identify that demand for air transport is primarily driven by economic growth and prosperity, there remains the underlying concern for fairness and openness. In particular, concern is expressed in relation to ‘subsidies, unfair practices, inconsistent or discriminatory application of regulatory frameworks and lack of transparency in financial reporting of companies in certain markets’, which when employed distort the (*or ‘their’*) market. Consequently, the EU continues to therefore say that it considers that ‘it is legitimate to defend the industry’ against such unfair competition.¹²⁴ In stating this, the EU continues to monitor and reinforce ‘measures to strengthen fair competition.’¹²⁵ But as the above discussion in

relation to the US-Gulf carriers subsidy allegations have shown, there remains a fine line in the interpretation of distorting measures - what a subsidy is, when action should be taken and importantly what this action should be. However, whilst the EU acknowledges the ineffectiveness of Regulation 868/2004, there remain transparency concerns as to the actual reasoning for determining this, with paradoxes stated in terms of explanations provided. The main problem is said to be, 'that the current EU legislative framework in practice does not *guarantee protection* of EU air carriers against subsidization and unfair pricing practices from third country airlines.' But of course the question remains as to whether any means should or could offer guaranteed protection, and consequently, the long-term results of either doing nothing, or intervening and in doing so, stifling development and competition. In other words, even a virtuous intervention of a conscious (or even unconscious) pursuit can lead to a demise of virtue, or in this case, the very concept of competition, and, ultimately, ICAO's vision of a more liberalized setting. Interference in the playing field, particularly when this comes from regions or countries, is inevitably an ineffective method to ensure '*equaliberalizm*' (equal liberalization). In respect to the ASR, the EU has identified three main approaches, namely:

- (1) Leaving the current framework and EU measures as they stand today – (Regulation 868/2004) but combining it with soft measures such as recommended fair competition clauses in ASA's between the EU and/or Member States and third countries;
- (2) Repealing the Regulation (ASR): while reinforcing the focus on the soft measures available to safeguard fair competition as mentioned within (1);
- (3) Revising the Regulation (ASR): while reinforcing the focus on the soft measures available to safeguard fair competition as mentioned within (1).

It will be interesting to see the 'revised' strategy developing over coming years and the preferred option, no doubt partly influenced by world events. However the EU reinforces the intention to work with ICAO in a bid to ensure fair competition. However, it should be recalled that the EU is not a signatory to the Chicago Contention and its role remains questionably, since it still only has observer status, which inevitably also put the EU Member States in somewhat of a quandary with membership of both the EU and of ICAO, wherein opinions and approaches of the two organizations are not always totally in harmony.

In 1997, in ICAO's first Strategic Action Plan, one of the Key Activities identified was the need to consider the,

- (i) Regulation of international air transport services and in so doing,

'To provide guidance for States on new regulatory arrangements to ensure progressive change towards market access, effective and sustained participation and fair competition in international air transport.'

- (ii) And, to consider trade in services, namely by studying,

'the applicability to international air transport of the principles and concepts in the General Agreement on Trade in Services (GATS) and promote in the World Trade Organization (WTO-OMC) the mandate, objectives and work of ICAO.'

Both of these objectives are as relevant today as they were 18 years ago. And, it would have to be questioned when these objectives will 'be coming of age,' and showing the maturity of development and progress needed in the growing globalized setting.

There remains logic in advocating a better mechanism for monitoring and ensuring competition fairness in air transport services alongside stressing that the divergence in ASA's is not conducive to ensuring an equal and fair market. The WTO is the only global international organization that actually deals with the rules of trade between nations, and the Organization's mission remains to open up markets, whilst making further advances in equitable trade.¹²⁶ Unfortunately, ICAO was never endowed with the same remit for economic advancement, and ASA's concluded on individual bases arguably continue to limit the progression of the liberalization of air transport service operations between countries, whilst also distorting competition.

The US has noticeably changed its stance in the 72 years since the conclusion of the Chicago talks, and although advocating and outwardly supporting Open Skies and a more liberalized setting, as competition and more equality of opportunity has developed between the previously weakened post war nations (i.e. Europe and the Gulf States in particular) there is an obvious paradox in its approach with an undercurrent of protectionism for its own 'airlines.' Once a nation that advocated fully open and liberalized skies, it has become a nation arguably 'reluctant' to pursue legislative changes either, i.e. as under the second Open-Skies agreement with the EU. It should be recalled that at the current time EU nationals are limited to 25% voting rights of US airlines (as part of the 'substantially owned and effectively controlled' provision) but as a consequence of the proposed legislative change this would see the majority ownership of EU airlines by US nationals as part of the reciprocity arrangements. Arguably therefore, the US government continues to shelter 'its' airlines from international competitors. However, the US airlines (and potentially the government) are now also showing an increasing tendency towards claiming 'ownership' of US passengers – even if this 'allegedly' means holding them to ransom on occasions over pricing.

The current Convention on International Civil Aviation was drawn up in the shadow of the war, when there was mistrust of nations – it could perhaps cynically be concluded that little has changed. There remains a fine line, whereby nationalism/patriotism becomes a distortion mechanism, which favours individuals, or nations. However, equally there is an even finer balance between patriotism and integrity. History has clearly shown the danger of citizens overextending support, the extremism of being over patriotic, whereby nationalism has resulted in unwanted consequences, such as discriminatory practices and even wars. Yet, paradoxically, on the converse side, after the Second World War there was also a rise of what is deemed new protectionism or 'neo-protectionism,' which saw national loyalty supporting the restructuring and development of local businesses and products. In many ways arguably this should remain the only means or residual barrier to free trade, which

would ultimately always remain difficult to legislate against. That said, there now appears to be a worrying undertone, as reflected by the UK's Brexit decision, and the recent election of Trump in the US, which indicates the leaning of the people towards an ever-growing insular return, one that is away from liberalization.

And, in conclusion, it would have to be identified that the biggest irony remains the stated Vision of the Contracting States of ICAO compared with their actions of nations. There ultimately remains a clear paradox, whereby States show little '*resolve to actively pursue.... continuous liberalization of international air transport to the benefit of all stakeholders and the economy at large;*' and, equally, do not show compatibility with.... '*the principle of fair and equal opportunity for all States and their stakeholders.*'

¹ Pursuant to the recommendation of the Sixth Worldwide Air Transport Conference (ATConf/6), as endorsed by the Council and the Assembly, and after consultation with States. Adopted at the Council's fifth meeting of its 205th Session.

² Mike Tretheway, Robert Andriulaitis. What do we mean by a level playing field in international aviation? *Transport Policy* 43, 2015, pp. 96–103.

³ Jaap G. de Wit, Unlevel Playing Field? Ah Yes, you Mean Protectionism. *Journal of Aviation Management*, Volume 41, October 2014, Pages 22-29.

⁴ The boundaries of this research concern passenger operations in the main.

⁵ Adam Smith. An Inquiry into the Nature and Causes of the Wealth of Nations.

⁶ Pekka Niemelä. A Cosmopolitan World Order? Perspectives on Francisco de Vitoria and the United Nations. A. von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, Volume 12, 2008, p. 301-344.

⁷ Grotius, H. (1625) *De iure belli ac pacis libri tres*, edited by P.C. Molhuysen, Leiden, Netherlands (1929).

⁸ See the discussions within, Johannes Thumfart, Economic Theology: On Grotius's *Mare Liberum* and Vitoria's *De Indis*, Following Agamben and Schmitt. *Grotiana* 30, 2009, pp. 65–87.

⁹ The International Civil Aviation Organization (ICAO) was founded through the Convention on International Civil Aviation (also known as the Chicago Convention). Convention on International Civil Aviation, opened for signature 7 Dec. 1944. Chicago. 61 Stat. 1180, 15. U.N.T.S. 295 (entered into force 7 April, 1947)

The Convention established certain principles and arrangements in order that international civil aviation can develop in a safe and orderly manner and that international air transport services could be established on the basis of equality of opportunity and operated soundly and economically; whilst, ICAO is the United Nations Specialized Agency responsible for establishing international standards, recommended practices and procedures covering the technical, economic and legal fields of international civil aviation operations.

¹⁰ Deborah Stone (2002) *Policy Paradox. The Art of Political Decision Making* (Pp. 1 - Introduction) W. W. Norton & Co. Ltd. New York.

¹¹ R. Doganis (2010) *The Airline Business*. (Within the acknowledgement section – pp. xi) Routledge.

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- ¹² Ronald, I. C. Bartsch (2012) *International Aviation Law: A Practical Guide*. Pp 47. Ashgate
- ¹³ IATA. New IATA Passenger Forecast Reveals Fast-Growing Markets of the Future. Press Release 57, 16 October 2014. <http://www.iata.org/pressroom/pr/Pages/2014-10-16-01.aspx>
- ¹⁴ IATA. Press Release No. 26. Date: 8 June 2015
<https://www.iata.org/pressroom/pr/Pages/2015-06-08-03.aspx>
- ¹⁵ The International Air Transport Association (IATA) announced on 10 December 2015 (Press Release 58) the airline industry outlook for 2016 which envisages an average net profit margin of 5.1% being generated with total net profits of \$36.3 billion. IATA also announced a revision to its airline industry outlook for 2015 upwards to a net profit of \$33 billion (4.6% net profit margin) from \$29.3 billion forecast in June 2015.
<http://www.iata.org/pressroom/pr/Pages/2015-12-10-01.aspx>
- ¹⁶ IATA. Press Release No. 26. Date: 8 June 2015
<https://www.iata.org/pressroom/pr/Pages/2015-06-08-03.aspx>
- ¹⁷ IATA. Press Release No. 27. Date 2 June 2016.
<http://www.iata.org/pressroom/pr/Pages/2016-06-02-02.aspx>
- ¹⁸ Thursday 23 June, 2016.
See the discussions by Sarah J. Fox, BREXIT: A bolt from the blue! – *Red sky in the morning? Issues in Aviation Law and Policy*. Volume 16, No. 1. Autumn, 2016.
- ¹⁹ US Presidential elections on Tuesday 8 November, 2016.
- ²⁰ Article 44 of the Chicago Convention. Convention on International Civil Aviation (latest edition – Doc 7300/9).
- ²¹ (Consulting editors: Stuart Weinstein and Charles Wild) S. J. Fox (2016) *Legal Risk Management, Governance and Compliance: Interdisciplinary Case Studies from Leading Experts*. Pp 135-155. Globe Law and Business.
- ²² Ibid.
- ²³ Despite high profile accidents, 2014 was the safest year ever according to ASN data. www.news.aviation-safety.net/2015/01/01 [Accessed 20 July 2015].
Recalling that 2014 saw the two high profile disasters involving Malaysian aircraft; flights - MH370 and MH17.
- ²⁴ See the discussion within (Consulting editors: Stuart Weinstein and Charles Wild) S. J. Fox (2016) *Legal Risk Management, Governance and Compliance: Interdisciplinary Case Studies from Leading Experts*, Pp 135-155. Globe Law and Business, where the opinion is expressed that even this is not as satisfactory as it should be due to regional divergence.
- ²⁵ Convention on International Civil Aviation, opened for signature 7 Dec. 1944. Chicago. 61 Stat. 1180, 15 U.N.T.S. 295 (entered into force 7 April, 1947)
- ²⁶ Sarah Jane Fox (2014) 'Security: *The influence of 9/11 to the EU Framework*.' *Research in Transportation Economics* – Special Edition DOI: 10.1016/j.retrec.2014.07.004. Vol. 45 (2014), pp. 24–33.
- ²⁷ Brian F. Havel and Gabriel S. Sanchez (2014) *The Principles and Practice of International Aviation Law*, Pp. 27, Cambridge University Press.
- ²⁸ Ronald I. C. Bartsch (2012) *International Aviation Law: A Practical Guide*, Pp. 19 Ashgate.
- ²⁹ The so-called 'Two Freedoms Agreement' - Air Service Transit Agreement, opened for signature Dec. 7 1944 59 Stat. 1693, 84 U.N.T.S. 389; and the so-called 'Five Freedom Agreement' – International Air Transport Agreement, opened for signature Dec. 7, 1944, 59 Stat. 1701, 171 U.N.T.S. 387.
See previous comments in related papers: Sarah J. Fox. (2014) The evolution of aviation in times of war and peace: blood, tears, and salvation. *International Journal On World Peace* Vol. XXXI No. 4 December 2014, pp. 49-79. Fox, S.J. (2015) 'CONTEST'ing Chicago origins and reflections: *lest we forget!*' *Int. J. Private Law*, 2015, Vol. 8, No. 1, pp.73–98.
- ³⁰ Ronald I. C. Bartsch (2012) *International Aviation Law: A Practical Guide*, Pp. 19 Ashgate.

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- ³¹ See Doganis (R. Doganis (2010) *The Airline Business*. Routledge) (As within the acknowledgement section – pp. xi) section 2: paradoxes within this paper.
- ³² Public Law 95-504, Oct. 24 1978. 92 Stat. 1705.
- ³³ First Package: (adopted in December 1987)
- Council Regulation (EEC) 3975/87 on the Application of the Competition Rules to Air Transport. OJ L 374, 31.12.1987, p. 1–8
 - Council Regulation (EEC) 3976/87 on the Application of the Treaty to certain categories of agreements and concerted parties. OJ L 374, 31.12.1987, p. 9–11
 - Council Directive 87/601/EEC on Air Fares. OJ L 374, 31.12.1987, p. 12–18
 - Council Decision 87/602/EEC on capacity-sharing and market access. OJ L 374, 31.12.1987, p. 19–24.
- Second Package: (adopted in July 1990)
- Council Regulation (EEC) 2343/90 on market access. OJ L 217, 11.8.1990, p. 8–14
 - Council Regulation (EEC) 2342/90 on air fares. OJ L 217, 11.8.1990, p. 1–7
 - Council Regulation (EEC) 2344/90 on the application of the Treaty to certain categories of agreement and concerted parties. OJ L 217, 11.8.1990, p. 15–16
- Third Package: (adopted July 1992)
- Council Regulation 2407/92 on licensing of air carriers. OJ L 240, 24.8.1992, p. 1–7
 - Council Regulation 2408/92 on market access. OJ L 240, 24.8.1992, p. 8–14
 - Council Regulation 2409/92 on fares and rates. OJ L 240, 24.8.1992, p. 15–17
- The Third Package remained applicable for 15 years, being replaced by Regulation 1008/2008 on common rules for the operation of air services in the Community (the Air Services Regulation. OJ L 293, 3–20).
- ³⁴ Ian Ayres and John Braithwaite (1992) *Responsive Regulation: Transcending the Deregulation Debate*. New York Oxford University Press.
- ³⁵ Fiona Haines (2011) *The Paradox of Regulation: what regulation Can Achieve and What it Cannot*. Edgar Elgar.
- ³⁶ See also J. Black. Critical Reflections on Regulation. *Australian Journal of Legal Philosophy*. Vol. 27, 2002, pp. 1–35.
- ³⁷ M. P. McCarthy, and T. P. Flynn, (2004) *Risk from the CEO and Board Perspective*. McGraw-Hill, New York.
- ³⁸ Peter Drucker (1979) *Management, an Abridged and Revised Version of Management: Tasks, Responsibilities, Practices*. Pan Books, London.
- ³⁹ Sarah J. Fox. (2014) The evolution of aviation in times of war and peace: blood, tears, and salvation. *International Journal On World Peace* Vol. XXXI No. 4 December 2014, pp. 49–79.
- ⁴⁰ John Viner, (1937). *Studies in International Trade Theory*. London: Allen and Unwin. Jing Ma, Free Trade or Protection: A Literature Review on Trade Barriers, *Research in World Economy* Vol. 2, No. 1; April 2011; Theberg, J.D. 1968. *Economics of Trade and Development*. London and New York: John Wiley and Sons, etc.
- ⁴¹ Anne Krueger, ed., (1996) *The Political Economy of Trade Protections*. University of Chicago Press.
- ⁴² Takumi Naito (2000) A Rationale for Infant-Industry Protection and Gradual Trade Liberalization. *Review of Development Economics* Vol. 4. (2) June 2000 pp. 164–174.
- ⁴³ World Trade Organization (WTO) <https://www.wto.org>
- ⁴⁴ Signed on 15, November 1995. WT/GC/W/10 – General Council.
- ⁴⁵ World Trade Organization (WTO) <https://www.wto.org>
(See also - Agreement on Subsidies and Countervailing Measures, April. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 14, Annex 1A.
- ⁴⁶ Jacob Viner, Memorandum on dumping
[*International Economic Conference, 1927. Preliminary reports, etc.*] Publications of the League of Nations: Economic and Financial.

⁴⁷ Agreement on implementation of Article vi of the General Agreement on Tariffs and Trade 1994. https://www.wto.org/english/docs_e/legal_e/19-adp.pdf

⁴⁸ Ashish K Vaidya (2006) Antidumping and Countervailing Duties, in *Globalization: Encyclopedia of Trade, Labor and Politics*. ABC-CLIO

⁴⁹ Ibid – referring the Kennedy Round (1964-97) which lead to the Antidumping Code in the Kennedy and Toyko rounds of GATT negotiations.

⁵⁰ In fact the full Uruguay Round is regarded as the most complicated of all the talks to date lasting over seven and a half years. In 1994 the package was signed in Morocco - Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Marrakesh Declaration, 15 April, 1994.

⁵¹ Discussion occurred in relation to the General Agreement on Trade in Services (GATS) but this did not include antidumping in respect to services.

⁵² Ashish K Vaidya (2006) Antidumping and Countervailing Duties, in *Globalization: Encyclopedia of Trade, Labor and Politics*. ABC-CLIO

⁵³ Roberta Piermartini and Linda Rousová (2008) Liberalization of Air Transport Services and Passenger Traffic. WTO. https://www.wto.org/english/res_e/reser_e/ersd200806_e.pdf [Accessed 17 October, 2015]

⁵⁴ Ibid.

⁵⁵ Agreement between the Government of the United Kingdom and the Government of the United States of America relating to Air Services between their Respective Territories Bermuda, 11, February 1946.

⁵⁶ Frederico Bergamasco. State Subsidies and Fair Competition in International Air Services: The European Perspective. *Issues in Aviation Law and Policy*. Vol. 15, Issue 1, Autumn, 2015, pp. 29-75.

⁵⁷ Brian F. Havel and Gabriel S. Sanchez (2014) *The Principles and Practice of International Aviation Law*, Cambridge University Press.

⁵⁸ Article 21 of the EU-US Air Transport Agreement as amended by the protocol on 24 March, 2010.

⁵⁹ See http://europa.eu/rapid/press-release_MEMO-10-103_en.htm?locale=en which should be contrasted against <http://www.state.gov/e/eb/rls/othr/ata/e/eu/151458.htm> Also see <http://www.state.gov/r/pa/prs/ps/2010/06/143593.htm> (Washington, DC June 24, 2010. And see <http://www.pillsburylaw.com/publications/us-and-eu-sign-enhanced-open-skiesagreement> [Accessed 15 October, 2015].

⁶⁰ Accessible at: <http://www.state.gov/documents/organization/151670.pdf> [Accessed 15 October, 2015]

⁶¹ Frederico Bergamasco. State Subsidies and Fair Competition in International Air Services: The European Perspective. *Issues in Aviation Law and Policy*. Vol. 15, Issue 1, Autumn, 2015, pp. 29-75.

⁶² Information based upon Sarah Fox (2009) PhD thesis (University of Northumbria - Law).

⁶³ See <http://eur-lex.europa.eu/en/treaties/index.htm>.

⁶⁴ Article 220 TFEU, Title VI the Union's relations with International Organisations and third countries and Union delegations (ex Articles 302 to 304 TEC). Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. Official Journal, C 306, 17 December 2007.

⁶⁵ For example the EU Emissions Trading Scheme (ETS)

See Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community. OJ L 8, 13.1.2009, p. 3–21.

⁶⁶ White Paper European transport policy for 2010: time to decide. COM(2001)370 Final. Brussels, 12/09/2001.

⁶⁷ Also referred to as the Lisbon Treaty. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December

2007. Official Journal, C 306, 17 December 2007.

⁶⁸ Single European Act (1986). Official Journal, L 169. of 29 June 1987.

⁶⁹ Case C-466/98 *Commission v. United Kingdom* [2002] ECR I-9427; Case C-467/98 *Commission v. Denmark* [2002] ECR I-9519; Case C-468/98 *Commission v. Sweden* [2002] ECR I-9575; Case C-469/98 *Commission v. Finland* [2002] ECR I-9627; Case-471/98 *Commission v. Belgium* [2002] ECR I-9681; Case C-472/98 *Commission v. Luxembourg* [2002] ECR I-9741; Case C-475/98 *Commission v. Austria* [2002] ECR I-9797; Case C-476/98 *Commission v. Germany*, 2002, ECR I-9855.

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⁷¹ ec.europa.eu – International Aviation.

⁷² Frederico Bergamasco. State Subsidies and Fair Competition in International Air Services: The European Perspective. *Issues in Aviation Law and Policy*. Vol. 15, Issue 1, Autumn, 2015, pp. 29-75.

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⁷⁸ Open sky agreements : Commission welcomes European Court of Justice ruling IP/02/1609, Brussels, 5 November 2002.

⁷⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on 'The EU's External Aviation Policy - Addressing Future Challenges.' Brussels, 27.9.2012 COM(2012) 556 final.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Regulation (EC) No 868/2004 of the European Parliament and of the Council of 21 April 2004 concerning protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community. OJ L 162, 30.4.2004, p.p. 1–7

⁸³ Richard Janda. Disciplining Subsidies within an EU-US Open Aviation Area. *5 J World Investment & Trade*, 2004, pp. 647-682.

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⁸⁹ The Daodejing - Laozi. Based the *Daodejing*, this relates to examining the relationship between the virtues and moral motivation. Laozi puts forward a view which might be termed a "paradox of virtue"—the phenomenon that a conscious pursuit of virtue can lead to a diminishing of virtue. (A two-thousand year old text by the legendary Daoist philosopher).

⁹⁰ Amended by Regulation (EC) No 596/2009, OJ L 188 18.7.2009

⁹¹ Council Regulation (EEC) No 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport (OJ L 378, 31.12.1986).

⁹² Regulation (EC) No. 868/2004 – within the Preamble.

⁹³ The initiative was entitled: Protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community.7/2013

⁹⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on ‘The EU’s External Aviation Policy - Addressing Future Challenges.’ Brussels, 27.9.2012 COM(2012) 556 final

⁹⁵ <http://www.icao.int/about-icao/Pages/default.aspx>

⁹⁶ “Challenges and Opportunities of Liberalization” (ATConf/5). 24-29 March, 2003.

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⁹⁷ Pursuant to the recommendation of the Sixth Worldwide Air Transport Conference (ATConf/6), as endorsed by the Council and the Assembly, and after consultation with States. Adopted at the Council’s fifth meeting of its 205th Session.

⁹⁸ In this regards direction in given in relation to specific documents which refer; namely, the *Policy Guidance on the Economic Regulation of International Air Transport* (Doc 9587), *Manual on the Regulation of International Air Transport* (Doc 9626), and *ICAO’s Policies on Taxation in the Field of International Air Transport* (Doc 8632).

⁹⁹ For example denied boarding, travelers with reduced mobility, liability in case of accidents, a code of conduct for computerized reservations system, package travel, etc.

¹⁰⁰ Aviation Law Reports, Issue No. 1552, July 30, 2015, Wolters Kluwer.

¹⁰¹ A ‘White Paper’ dossier from ‘The Partner coalition for Open & Fair Skies’ (composed of American Airlines, Delta Air Lines and United Airlines, along with the Air Line Pilots Association, Int’l, the Allied Pilots Association, the Airline Division of the International Brotherhood of Teamsters, the Association of Flight Attendants-CWA, the Association of Professional Flight Attendants, the Communications Workers of America and the Southwest Airlines Pilots’ Association).

‘Restoring Open Skies: The need to address subsidized competition from state-owned airlines in Qatar and the UAE.’ 28 January, 2015.

¹⁰² DOC website –www.regulations.gov (DOC-2015-0001)

¹⁰³ Available at the DOC website –www.regulations.gov (DOC-2015-0001-0335) JetBlue_Rebuttal_June_16.pdf [Accessed 21 October 2015]

¹⁰⁴ <http://www.scribd.com/doc/265377400/Etihad-Airways-Report-on-U-S-airline-government-benefits> [Accessed 21 October, 2015]

¹⁰⁵ IAG report (DOC-2015-0001-0036) International_Airlines_Group_comments_051315.

¹⁰⁶ See more at: <http://usuaebusiness.org/2014/02/u-s-u-a-e-trade-reaches-record-26-9-billion/#sthash.tN9UfKSy.dpuf>

¹⁰⁷ US information on data states: ‘all figures are in millions of U.S. dollars on a nominal basis, not seasonally adjusted unless otherwise specified. Details may not equal totals due to rounding.’

¹⁰⁸ IAG report (DOC-2015-0001-0036) International_Airlines_Group_comments_051315

¹⁰⁹ H.R. 441 – 114 Congress – (Introduced in House 02/03/2016).

Also see the amendments advocated by Senator Blumenthal as expressed by the National Consumers League: http://www.nclnet.org/faa_reauth_letter

¹¹⁰ IAG report (DOC-2015-0001-0036) International_Airlines_Group_comments_051315.

¹¹¹ Aviation Law Reports, Issue No. 1551, July 14, 2015.

¹¹² The complaints were filed in federal district courts and are: *Devivo v. Delta Airlines, Inc.*, 7:15-cv-0516, filed July 1, 2015 in the Southern District of New York; *Andrade v. American Airlines, Inc.*, 3:15-cv-03111, filed July 6, 2015 in the Northern District of California; and *Blumenthal v. American Airlines, Inc.*, 1:15-cv-01056, filed July 6, 2015 in the District of Columbia.

(All allegations relate to violation of the Sherman Act with one asserting a further violation of the Clayton Act).

¹¹³ Aviation Law Reports, Issue No. 1553, August 11, 2015 (DOT Press Release, July 24, 2015 refers).

¹¹⁴ Ibid.

¹¹⁵ Available at: http://www.worldairlineawards.com/Awards/world_airline_rating.html
'The survey is based on measuring customer satisfaction for the Passenger Experience, across both Airport and Onboard environments - including check-in to boarding, onboard seat comfort, cabin cleanliness, food, beverages, IFE, staff service and associated travel items. Data weighting is applied to provide nomination equity when evaluating airlines of different size. Data weighting uses passenger numbers for airlines featured in the Survey. Survey responses are screened to identify and monitor ISP / user information and delete duplicate and multiple entries.'

¹¹⁶ Ibid. <http://www.worldairlineawards.com>

¹¹⁷ IATA Press Release 27, *Industry Profitability Improves* – 2 June, 2016.

<http://www.iata.org/pressroom/pr/Pages/2016-06-02-02.aspx>

¹¹⁸ Sarah J. Fox (2016) BREXIT: A bolt from the blue! – *Red sky in the morning? Issues in Aviation Law and Policy*. Volume 16, No. 1. Autumn, 2016.

¹¹⁹ Based on specific wording used within 'The level playing field is green': Speech, Brussels 12 October 2015

http://ec.europa.eu/commission/2014-2019/vestager/announcements/level-playing-field-green_en [Accessed 17 October, 2015].

¹²⁰ 'The values of competition policy.' Keynote speech at CEPS Corporate breakfast - one year in office. Speech, Brussels 13 October 2015

¹²¹ ec.europa.eu – International Aviation.

¹²² Frederico Bergamasco. State Subsidies and Fair Competition in International Air Services: The European Perspective. *Issues in Aviation Law and Policy*. Vol. 15, Issue 1, Autumn, 2015, pp. 29-75.

¹²³ EU External Aviation Policy Package, European Commission, MEMO/12/714; 27/09/2012. (Also see - Commission's Communication COM(2012) 556 on The EU External Aviation Policy – Addressing Future Challenges).

¹²⁴ Ibid.

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¹²⁶ World Trade Organization (WTO) <https://www.wto.org>